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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARGARET NELSON, Plaintiff and Appellant, v. COUNTY OF ORANGE, Defendant and Respondent.	G039548 (Super. Ct. No. 03CC10592) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory Munoz, Judge. Affirmed.

Law Offices of Sylvia Kellison and Sylvia Kellison for Plaintiff and Appellant.

Koeller, Nebeker, Carlson & Halluck, and William L. Haluck for Defendant and Respondent.

Margaret Nelson appeals from the judgment entered against her in her lawsuit against the County of Orange (the County). She contends the court erred in rejecting her peremptory challenge of the trial judge – as well as her motion to disqualify the individual trial judge, and indeed the entire Orange County Superior Court bench, for cause. However, sole remedy for such errors, if that is what they were, was to file a petition for writ of mandate pursuant to Code of Civil Procedure section 170.3. The argument is simply not cognizable on appeal from the ensuing judgment.

Nelson also asserts the judgment must be reversed because the jury's answer to one of the special verdict questions – which supported its rejection of her claim for damages caused by a hostile work environment – was joined in by only eight jurors. While she is correct that a verdict concurred in by only eight of twelve jurors is insufficient to support a civil verdict, we agree with the trial court's assessment that the error was immaterial in this case. Despite the fact that only eight jurors agreed on the challenged question, the jury's responses to the other questions posed in the special verdict were independently sufficient to support its rejection of her claim.[1] The judgment is affirmed.

FACTS

Nelson opted to proceed with an appellant's appendix in lieu of a clerk's transcript. That appendix includes only four documents from the trial court proceedings: (1) the one-page motion to peremptorily challenge Judge Gregory Munoz from presiding over the trial; (2) the two-page affidavit of prejudice asserting not only that Judge Munoz should be disqualified, but that the entire Orange County Superior Court bench should be recused from presiding over the case; (3) the judgment on special verdict; and (4) the notice of entry of judgment.

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[1] At oral argument, Nelson's counsel also complained of judicial misconduct during trial, but no such argument was raised in her brief.

The County has provided us with a few additional documents in its own appendix, including the complaint and the minute order reflecting the court's denial of the motion for disqualification. However, because neither party has included in their briefs any summary of the evidence produced during the 23-day trial, we have little information about the exact nature of the claims asserted in this case.[2]

We can note that the affidavit of prejudice signed by Nelson's attorney asserts that Nelson is, or was, a probation officer assigned to a domestic violence program under the supervision of a series of superior court judges – including, at one point, Judge Munoz. In this case, she alleged "discrimination" relating "to her being given assignments where she was not given reasonable accommodations and was assigned work which exacerbated her work related injuries, including her assignment as a probation officer to the domestic violence program."

The special verdict form given to the jury reflects that the questions answered by the jury were divided into sections entitled "disparate treatment;" "retaliation;" "hostile work environment harassment;" "disability discrimination – disparate treatment;" and "disability discrimination – reasonable accommodation,"

With that extremely limited background in mind, we turn to Nelson's claims of error.

I

Nelson first argues the court erred in rejecting her requests for disqualification of (1) the specific trial judge who presided over her case; and (2) the entire Orange County Superior Court bench.

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[2] On the other hand, Nelson *has* provided us with the entire reporter's transcript of the 23-day trial. To the extent this implies a belief that we would review that transcript in its entirety, to discern the precise nature of Nelson's claims herein, that belief was incorrect. For its part, the County takes the position that it "will not belabor this brief with an extensive recitation of facts in that they are not particularly relevant to resolution of this appeal."

Nelson moved to disqualify Judge Munoz, both peremptorily and for cause,[3] in Feburary of 2004, nearly six months after her case was filed and assigned to Munoz. In her affidavit of prejudice supporting the claim of good cause, Nelson asserted that her involvement as an employee in the court's domestic violence program, and the likelihood that other employees involved in the program might be called as witnesses, created a conflict of interest for the entire Orange County Superior Court bench. She further alleged Judge Munoz may have been responsible for a domestic violence program at the time she had worked in the program, and that he "may be called" as a witness to her involvement.

Judge Munoz denied the challenge, explaining he did not know Nelson, nor did he have any knowledge of her working conditions.

We first note that Code of Civil Procedure section 170.6, which governs peremptory challenges, requires that in a case assigned to a single judge for all purposes, such a challenge must be filed "within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance." (Code Civ. Proc., § 170.6, subd. (a)(2).) Nelson's peremptory challenge was not filed until *several months* after her case was assigned to Judge Munoz for all purposes, and thus it was properly rejected.

With respect to the disqualification for cause, Code of Civil Procedure section 170.3, subdivision (c)(1) requires that such a request "shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." In this case, there is every reason to assume that Nelson would have had all the pertinent facts regarding the basis for the requested disqualification – i.e., the

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[3] Code of Civil Procedure section 170.1 provides in pertinent part that a judge shall be disqualified if he or she "has personal knowledge of disputed evidentiary facts concerning the proceeding." (Code Civ. Proc., § 170.1, subd. (a)(1)(A).) The statute goes on to define personal knowledge as follows: "A judge shall be deemed to have personal knowledge within the meaning of this paragraph if the judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is to the judge's knowledge likely to be a material witness in the proceeding." (Code Civ. Proc., § 170.1, subd. (a)(1)(B).)

basic facts of her own working situation – prior to the time she chose to *file* her lawsuit in Orange County. Her substantial delay in asserting that the individual judge, or indeed the entire court, might be prejudiced or subject to some conflict of interest with regard to her claims, would likely also provide a sufficient basis for the court to reject that assertion.

But we need not decide the issue, because as the County points out, if Nelson had wished to challenge the court's rejection of her claim that both the Superior Court in general, and Munoz in particular, should have been disqualified from this case, her exclusive remedy was to proceed by writ under Code of Civil Procedure section 170.3, subdivision (d).[4] She did not, and consequently the issue is waived. "As we have repeatedly held, the statute means what it says: Code of Civil Procedure section 170.3, subdivision (d) provides the exclusive means for seeking review of a ruling on a challenge to a judge, whether the challenge is for cause or peremptory." (*People v. Panah* (2005) 35 Cal.4th 395, 444.) An "exclusive" writ remedy leaves no room for an appeal.

II

Nelson also argues the judgment should be reversed because the jury failed to resolve one of the questions on the special verdict form with the required nine-member majority. The record supports her assertion.

The jury's special verdict, with respect to Nelson's claim of "hostile work environment harassment – employer or entity defendant, starts with the question 1: "Was *Nelson* an employee of *County of Orange*?" The jury answered unanimously, by simply placing a check next to "yes."

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[4] Code of Civil Procedure section 170.3, subdivision (d) provides: "(d) The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding. The petition for the writ shall be filed and served within 10 days after service of written notice of entry of the court's order determining the question of disqualification. If the notice of entry is served by mail, that time shall be extended as provided in subdivision (a) of [Code of Civil Procedure] Section 1013."

The form went on with the instruction "[i]f your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form." Question 2 inquired: "Was *Nelson* subjected to unwanted harassing conduct because she was/was believed to be female, disabled or having complained about discrimination?" The jury answered by recording "(4)" votes next to "yes" and "(8)" votes next to "no." The form went on to instruct the jurors that "If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form."

Perhaps understanding that an eight-member majority was not a large enough group to constitute a legally effective "no" answer – or perhaps just out of rebellion or confusion – the jury proceeded to question 3: "Was the harassment so severe, widespread, or persistent that a reasonable woman or disabled person and/or complainer of discrimination in *Nelson's* circumstances would have considered the work environment to be hostile or abusive?" The jury answered that question by recording "(3)" votes next to "yes" and "(9)" for "no."

The form then instructed that "[i]f your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form." Despite its legally sufficient 9-member "no" vote on question 3, the jury nonetheless proceeded to question 4: "Did *Nelson* consider the work environment to be hostile or abusive?" The jury again simply placed a check next to "yes," reflecting its unanimous view.

The verdict form then instructed the jurors that "[i]f your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form." Question 5 inquired: "Did *County of Orange* or its supervisors or agents know or should

he/she/it/they have known of the conduct?" The jury answered "yes," again unanimously.

The verdict form then instructed the jurors that "[i]f your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form." Question 6 was "Did *County of Orange* or its supervisors or agents fail to take immediate and appropriate corrective action?" The jury simply placed a check next to "no," again reflecting its unanimous conclusion. And that time, it finally followed the form's instruction that "[i]f your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form."

Nelson focuses exclusively on question 2, arguing that the jurors' 8-4 rejection of the claim that Nelson was subjected to "unwanted harassing conduct because she was/was believed to be female, disabled or having complained about discrimination" was not legally sufficient to constitute a binding verdict on that issue.

We agree with Nelson's point, as far as it goes. The problem is that it doesn't go very far. Granted, the record demonstrates that the jury's answer to question 2 was not concurred in by the required nine-member majority necessary to qualify it as a proper part of the "verdict." However, even if that question were omitted from the verdict entirely, what is still clear is that a proper majority of the jury concluded that to the extent Nelson's treatment in the workplace could be characterized as "harassment," it was nonetheless *not* "so severe, widespread, or persistent that a reasonable woman or disabled person and/or complainer of discrimination in *Nelson's* circumstances would have considered the work environment to be hostile or abusive." What is also clear is that to the extent the County, or its supervisors or agents knew about harassing conduct, the jury unanimously rejected Nelson's assertion that they "fail[ed] to take immediate and appropriate corrective action."

In order for Nelson to prevail on a claim for damages based upon a hostile work environment, she was obligated to prove *all* of the elements of her claim. One of those elements was that the level of harassment was so severe that a reasonable person in the plaintiff's position would have considered the work environment hostile or abusive: "Claims of a hostile or abusive working environment . . . arise when a workplace is 'permeated with "discriminatory intimidation, ridicule, and insult . . ." [citation] that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment". . . .'" (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1377, quoting *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21.) As a consequence, the requisite severity of the harassing conduct is one of the elements which a plaintiff must allege and prove as part of her claim. (*Jones v. Department of Corrections & Rehabilitation, supra*, 152 Cal.App.4th at p. 1377.)

The special verdict here establishes that while the jury may not have effectively rejected Nelson's contention she had experienced some level of harassment in her workplace, it *did* reject her assertion that the harassment she described rose to a legally compensable level. Consequently, without regard to the jury's answer to question 2, its special verdict constituted an effective rejection of Nelson's claim.

Additionally, the jury also unanimously rejected Nelson's claim that the County had "fail[ed] to take immediate and appropriate corrective action" in relation to the harassment she suffered. That answer was also sufficient to negate liability, even assuming the jury otherwise believed the harassment had occurred. "An employer is strictly liable for harassment committed by its agents or supervisors, but is liable for harassment committed by its other employees *only if it fails to take immediate and appropriate corrective action* when reasonably made aware of the situation." (*Jones v. Department of Corrections & Rehabilitation, supra*, 152 Cal.App.4th at p. 1376, italics added.)

The trial court reached the same conclusion. After the jury rendered its verdict, and was polled regarding each juror's answer to the individual special verdict questions, the court requested the jurors return to the jury room while the parties discussed the verdict. The court then noted that although the jury's answer to that one special verdict question was not legally sufficient, it believed the jury's answers to the other questions had "negated" that error, and that the verdict was nonetheless sufficient to support a judgment in favor of the County. As explained in *Contreras v. Goldrich* (1992) 10 Cal.App.4th 1431, that analysis was sound.

In *Contreras*, a medical malpractice case, the appellate court concluded that the jury's special verdict was sufficient to sustain a judgment in favor of the defendant, because although it had been unable to reach a conclusion about whether the defendant was negligent, the jury had nonetheless concluded that any negligence was not the legal cause of the plaintiff's injury: "A cause of action in tort for professional negligence requires as a necessary element a proximate causal connection between the negligent conduct and the resulting injury. [Citations.] Therefore, when the jury specially found that respondent's alleged negligence was not a legal cause of appellant's injury, nothing remained for the court but to draw the conclusion of law that respondent is not liable to appellant." (*Contreras v. Goldrich, supra*, 10 Cal.App.4th at p. 1433.)

Finally, even if the special verdict were not sufficient in this case, we would have no choice but to conclude Nelson had waived that deficiency. Although Nelson did express disagreement with the court's determination that the verdict was sufficient despite the 8-4 split on question 2, she expressly declined to do "anything [about it] right this minute." Instead, she stated she would address the issue in a "motion for a new trial or an appeal." Consequently, when the court called the jurors back into the court room, it officially excused them rather than requiring any further deliberation on question 2.

Nelson's failure to request further deliberation, and her acquiescence in the decision to excuse the jurors instead, amounted to a waiver of any insufficiency in the verdict. "The proper procedure where an informal or insufficient verdict has been returned is for the trial court to require the jury to return for further deliberation. . . . [¶] It is well established by numerous authorities that when a verdict is not in proper form and the jury is not required to clarify it, any error in said verdict is waived by the party relying thereon who at the time of its rendition failed to make any request that its informality or uncertainty be corrected." (*Brown v. Regan* (1938) 10 Cal.2d 519, 523.)

The judgment is affirmed, and the County is entitled to recover its costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.